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SUPREME COURT, U.S.
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No. 04-47

In the Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,

PETITIONER,

v.

CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The petition demonstrated that this case would be an excellent vehicle for this Court to provide much-needed guidance on the application of *Gore* and *State Farm*. It squarely presents several open questions that have bedeviled and divided the lower courts, including: the appropriate "reprehensibility" analysis in cases involving no intentional misconduct; the proper "ratio" analysis when compensatory damages are substantial; the relevance of alleged misconduct in other states and by other companies; the limits on state power to punish defendants for conduct governed by preemptive federal law; and the appropriate standard of review for the evaluation of reprehensibility when the jury has made no specific factual findings. It also presents a preemption question of great importance to federal rail safety policy. Respondents essentially concede that there was no *intentional* misconduct by UP, and that this jury may well have fined UP $25 million for failing to "slow order" trains—despite the fact that federal law entirely preempts state claims premised on train speed. Respondents offer no persuasive reason to deny certiorari.

1. Respondents' waiver argument, Opp. at 8-10, rests on a partial, and out-of-context, quote from UP's brief to the Arkansas Supreme Court. What UP actually wrote was: "While a ratio of five times the compensatory award is *putatively* within constitutional bounds in a personal injury case, an award of $25 million cannot possibly be squared with the first and third *Gore* criteria." App. at 232 (emphasis added). UP's statement did not represent that the ratio in this case was acceptable, but rather spoke only to what ratios are "putatively" permissible in personal injury cases generally—while simultaneously describing glaring defects in the specific award in this case. UP's extensive briefing of the reprehensibility and comparable penalties guideposts, App. at 227-32, necessarily incorporated the ratio issue as well. Even Respondents recognize that all three *Gore* guideposts are inextricably

intertwined. *See* Opp. at 15 (proper ratio "cannot be resolved without weighing ... all three of the *Gore/State Farm* elements"). And based on those arguments, UP sought vacatur of the award, or remittitur to $100,000—a 0.02-to-1 ratio. App. at 232. Perhaps most tellingly, the Arkansas Supreme Court addressed the ratio guidepost on the merits. Rather than simply dismissing it as waived, the Arkansas Supreme Court tested the 5-to-1 ratio in this case against its understanding of *State Farm*. Pet. App. 33a.[1] It cannot be "sandbagging" to challenge that Court's interpretation of the very case it applied.

In any event, UP amply preserved its federal *claim* in this case—that the jury's punitive damages award violated the Due Process Clause as illuminated by *State Farm*. UP cited *State Farm* and asked that the award be vacated. App. at 232-33. Under well-established law, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992).[2]

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[1] For this reason, respondents' authorities are inapposite. *See United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (distinguishing cases in which theory presented "was addressed by the court" below); *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (relying on fact that "the highest state court has failed to pass upon a federal question"); *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (considering waiver only where "highest state court is silent on a federal question before us"). The Arkansas Supreme Court spoke not only to the federal claim or question here (whether this award comports with the Due Process Clause) but also to the specific argument: whether a 5-to-1 ratio is consistent with *State Farm* in these circumstances.

[2] *See also Yee*, 503 U.S. at 534 (regulatory taking *argument* not waived, even though not presented below, because petitioner properly preserved *claim* that city ordinance violated the Takings Clause); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (reaffirming *Yee*, and expressing particular reluctance to find waiver where "it appears to us that the [court below] understood the tenor of the argument"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002)(finding "argument" waived only where respondent failed to preserve claim that federal maritime law governed).

2. Respondents strain to minimize the conflict with *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), Opp. at 10-11. Yet *Exxon Valdez* held that "[t]he test of whether a punitive damages award survives review *cannot be* merely whether there is any evidence to support it," 270 F.3d at 1240, while the Arkansas Supreme Court held the opposite: it could not "substitute [its] judgment for that of the jury when there is basis in the evidence for the punitive award." Pet. App. 36a. Respondents assert that the Arkansas Court was only referencing its state law analysis. Opp. at 10 n.2. But that paragraph immediately follows, and clearly refers to, the Court's federal analysis. By that point in the opinion below, the state law analysis was complete, and the Court had just finished its application of the *Gore* guideposts. Pet. App. 31a-36a. At a minimum, the "basis in the evidence" standard is "interwoven with the [Court's] federal law" analysis. *Arizona v. Evans*, 514 U.S. 1, 7 (1995); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Since it "is not *clear* from the face of the opinion" that this standard is independent of the Court's *State Farm* analysis, it must be presumed to be federal in character. *Id.* at 1041 (emphasis added).

The Arkansas Supreme Court's recitation of the words "*de novo*" does not ameliorate the conflict. The analysis the Arkansas Supreme Court actually performed reveals that it adhered to the "basis in the evidence" standard rather than performing genuine *de novo* review. The Court drew all possible inferences in favor of the Barbers, relying on "facts" completely unsupported by the record (as the dissenting Justices observed) and repeatedly relying on facts the jury *might* have found. *See* Brief for the United States Chamber of Commerce, at 12 & n.5. That is not the exacting *de novo* review required by *State Farm*.

3. The remainder of respondents' punitive damages analysis consists of an effort to transform this Court's acknowledgment that the precise amount of a punitive award must be based on "the facts and circumstances" of

each case, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2002), into an impediment to further guidance from this Court. Opp. at 12-20. This Court has called for "[e]xacting appellate review" of punitive damages awards. 538 U.S. at 418. It follows that whatever "facts and circumstances" might justify a $25 million punitive damages award must be consistent with the principles of *State Farm*. And this Court has granted review several times to illuminate the character of the Due Process standard to be applied in future cases. It should do so here as well.[3]

First, the Arkansas Supreme Court's reprehensibility analysis relies on 20/20 hindsight. Respondents suggest UP recklessly disregarded a known danger, Opp. at 2-3, 12-13, relying on "near misses" never reported to UP, Pet. App. 15a-18a, and "complaints" and "warnings" that hardly differentiate this case from ordinary negligence. Respondents insinuate UP favored its own workers over the motoring public, Opp. at 13, but UP track workers use track machinery that, unlike trains, has no lights and no horns, making flagmen necessary to protect both workers *and* motorists. Respondents' suggestion that UP did nothing to fix the problems at Crossing 123, Opp. at 2, founders on the undisputed fact that UP entered into a contract to have vegetation cleared all along the subdivision. Pet. App. 41a-42a. And the assertion that UP never funded that contract, Opp. at 3, was not adopted by the Court below, presumably because it is contradicted by the record: the contract on its face guarantees payment of almost three-quarters of a million dollars, to be paid as Tweedy Contractors performed work. Add. at 527.

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[3] The spoliation issue, far from creating a vehicle problem, Opp. at 16-18, makes review even more important to close a loophole in *State Farm*. The adverse inference instruction, which respondents characterize as "routine," Opp. at 17, will become ubiquitous once the plaintiffs' bar discovers it can support millions in punitives. Respondents offered no rebuttal to petitioner's cases holding that the inference calls for raw speculation, which then defeats appellate review.

Despite respondents' protests, the Barbers emphatically did "urge the jury to hold Union Pacific 'accountable for what it's doing across the country.'" Opp. at 19. Dr. Levine did not confine his nation-wide and industry-wide observations to his "credentials," Opp. at 19 n.10, but also incorporated them into his "expert" opinion. He expressly testified as to UP's "overall policy" and UP's "part [in] an industry-wide policy also." App. at 127. He opined generally as to all railroads' responsibility for upgrading crossings. App. at 130. He relied heavily on UP's national claims manual, even extracting the conclusion that UP's budget called for killing Arkansans. App. at 131-33. And on cross he revealed that he is "critical of Union Pacific for not spending enough money on grade crossing safety, because *I have no evidence that they'd spend enough.* I criticize *all the of the railroads* for not spending enough money." App. at 136 (emphasis added). The jury that heard Dr. Levine, and the Court that repeatedly invoked his opinion, flatly ignored *State Farm*'s prohibition on extraterritorial punishment.

Second, the Court's interpretation of the ratio guidepost conflicts both with *State Farm* and a recent decision of the Eighth Circuit. Conceding that the Arkansas Supreme Court did not even acknowledge *State Farm*'s guidance on 1-to-1 ratios, respondents rest on their theme that punitive damages are fact-specific determinations. Opp. at 14-15.[4] However, the "facts and circumstances" identified by respondents are the same facts used to justify the imposition of punitive damages *at all*. *Compare* Opp. at 14, *with* Pet. App. at 24a-29a. Petitioner never suggested that

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[4] Respondents' theory that cases involving facts are not suitable for certiorari reaches its most absurd with the assertion that reviewing prior decisions for compliance with *State Farm*'s ratio guidance is "of no assistance." Opp. at 14 n.6. *State Farm* clearly contemplated that 1-to-1 ratios would be the norm in cases with substantial compensatory damages. 538 U.S. at 425. If reviewing courts find "facts and circumstances" sufficient to disregard *State Farm* thirty out of thirty-one times, *see* Pet. at 15 & n.8, that strongly suggests the lower courts are consistently misunderstanding the fact-specific inquiry.

the 1-to-1 principle overrides all other considerations. But if that portion of *State Farm* means anything at all, it must surely mean that where compensatory damages are substantial, 1-to-1 is the presumptive cap and a higher award requires "facts and circumstances" well beyond those needed to support the imposition of punitive damages at all. At a 1-to-1 ratio, UP would still pay $5 million in compensatory damages and $5 million in punitives. Respondents nowhere explain how the facts they point to—Mr. Barber's injuries and UP's failure to improve Crossing 123—justify an *additional* $20 million.

The Arkansas Supreme Court's decision also conflicts with a recent opinion of the Eighth Circuit. In *Conseco Fin. Servicing Corp. v. North Am. Mortgage Co.*, ___ F.3d ___, No. 03-1443, 2004 WL 1907796, *1 (8th Cir. Aug. 27, 2004), the jury awarded $3.5 million in compensatory and $18 million in punitive damages in an unfair competition case. The Eighth Circuit (which includes Arkansas) found sufficient reprehensibility to support the award, *id.* at *11, and found the third guidepost inapplicable due to an absence of comparable penalties. *Id.* at *9 n.11. The Eighth Circuit nevertheless reduced the punitive award from a 5.4-to-1 ratio to a 2-to-1 ratio, invoking *State Farm*'s guidance that substantial compensatory awards presumptively call for ratios at or near 1-to-1, and reasoning that "because Conseco received a large compensatory award in this case—$3.5 million—in the 'absence of extremely reprehensible conduct against the plaintiff or some special circumstance' the large exemplary award cannot stand unmodified." *Id.* at *10. Thus, had this case been tried in federal court in Arkansas, even by the identical jury, UP's due process rights would have been protected by genuine scrutiny of the punitive award, taking seriously this Court's directive that ratios at or near 1-to-1 are required when compensatory damages are substantial. *See also Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) (reducing punitive award from $6 million to $600,000, on compensatories of $600,000).

Plaintiffs' forum selection here was outcome determinative, subjecting UP to a rule of law that approves 5-to-1 ratios reflexively. Pet. App. 33a.[5]

Third, the Court's interpretation of the third guidepost conflicts both with *State Farm* and with the Eleventh Circuit's decision in *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999). *State Farm* requires an assessment of the legislative penalty that is realistic, not wild speculation about the maximum penalty a regulator could possibly impose. And *Combustion Engineering* used as its baseline the fine actually imposed, even though Georgia's statute provided for "civil fines of up to $100,000 per day." 170 F.3d at 1337. Respondents attempt to distinguish *Combustion Engineering* as only calling for comparison to the "penalty ... imposed in this specific case." Opp. at 11. That reading only sharpens the conflict. In this case the relevant regulators, despite having a statutory penalty at their disposal, elected to impose no penalty whatever. Under respondents' view of *Combustion Engineering*, then, the proper baseline for comparison here is zero. At most, the proper baseline is the penalty FRA has imposed in comparable cases. Either way, the Arkansas Supreme Court radically misjudged the baseline against which it was to test the jury's punitive damages award. Certainly *Combustion Engineering*'s later conclusion—that a 435 to 1 ratio of punitives to legislative penalties is acceptable, *see* Opp. at 11-12, 15-16—is at odds with *State Farm*'s principles. That, however, is simply another reason to grant review in this case: even courts that select a proper baseline under the third guidepost have not applied that guidepost to meaningfully constrain awards.

4. Contrary to respondents' arguments, Opp. at 20-27, the preemption question is certworthy for two reasons. *First*, the opinion below conflicts with this Court's decisions

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[5] Plaintiffs defeated removal here by naming L.E. Piper, Jr., the train engineer. Pet. App. 2a. Mr. Piper was an Arkansas resident. Tr. at 6058. The jury found for Mr. Piper on all counts. Pet. App. 5a.

in *Maryland v. Baldwin*, 112 U.S. 490 (1884), as well as *Felder v. Casey*, 487 U.S. 131 (1988), and their progeny. *See* Pet. at 28-30.[6] *Second*, the judgment below frustrates rail policy by permitting massive damages for conduct that conforms to federal safety standards.

UP made this argument abundantly clear—both in the trial court and on appeal. The Arkansas Supreme Court twice recognized that UP asserted a preemption objection to the slow order evidence. *See* Pet. App. 4a, 5a. Consistent with Ark. S. Ct. R. 4-2(7), *cited in* Opp. at 23, UP introduced the issue with the heading "*Federal Law Preempts* The Claim Of Negligent Failure To Issue A Slow Order." App. at 222 (emphasis added); *see also* Reply Brief at 5 (same). UP extensively discussed *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658 (1993), and other preemption cases, repeatedly explained why the slow order question was categorically preempted, and at *no* point discussed the sufficiency of evidence to support the slow order theory. Not only UP's claim, but even its precise arguments were extensively preserved below, and any confusion in the opinions below cannot be attributed to UP's briefing.

Respondents' defense of the Arkansas Court's standard of review merely repeats the Court's mistake.[7] Although a

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[6] Respondents' citation to *Griffin v. United States*, 502 U.S. 46 (1991), could not be more inapposite. *Griffin* was a criminal case that did not purport to overrule (indeed did not even cite) the *Baldwin* line of cases that govern civil actions. Moreover, *Griffin* holds that even in a criminal case, where "jurors have been left the option of relying upon a *legally* inadequate theory," reversal is mandatory. *Id.* at 59.

[7] Continuing their theme that all difficult arguments must have been waived, respondents claim that UP waived the argument that *Baldwin* controls. Opp. at 25. The first time that argument came into play was after the decision of the Arkansas Supreme Court. Respondents never argued that the rule of *Union Pacific R.R. Co. v. Sharp*, 952 S.W.2d 658 (Ark. 1997), required affirmance of the jury's verdict even if the slow order theory was preempted. The *first* time that assertion was made was in the Arkansas Supreme Court's opinion, and UP promptly moved for reconsideration, citing *Felder* and its progeny. Likewise, UP did not waive the argument that the "slow order" theory invalidated the punitive

rule "concerning appellate review of *evidentiary* challenges" might not ordinarily burden federal rights, Opp. at 26 n.15, when that rule is applied to permit the jury to consider an *entire theory of liability* that is preempted by federal law it most certainly does. The trial court recognized that this jury was told that UP negligently failed to order its trains to run slower than the federally approved speed limit and "obviously ... if they found that to be so, I assume that they would consider that ... on the punitive damages issue." App. at 207. Even the Arkansas Supreme Court incorporated speed into its punitive damages calculus, holding that recklessness could be inferred because UP "knew or ought to have known ... that allowing the vegetation to remain overgrown and allowing trains to pass through Crossing 123 *at close to sixty miles per hour* would naturally or probably result in injury." Pet. App. at 28a-29a (emphasis added). Respondents do not—indeed cannot—deny that this state jury likely fined UP $25 million for conduct protected by preemptive federal law.

To escape the obvious conclusion—that the jury's verdict must be vacated—respondents conjure an alternative theory: that slow orders would be relevant as circumstantial evidence that UP knew its track was in poor shape. Opp. at 21-23. Yet respondents—normally quite sensitive to waivers—never argued this theory below, never got a ruling adopting it, Opp. at 22 (trial court ruling "concededly opaque"), and never briefed it to the Arkansas Supreme Court. Brief of Appellee at 9-11 (arguing only that failure to issue a slow order creates negligence liability). In any event, respondents cannot seriously contend that the jury would have known to consider the slow order evidence only as circumstantial proof of track condition, Opp. at 22, given that the trial judge (and counsel for the Barbers) both seemed to believe that *Easterwood* would permit a finding

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damages award. Opp. at 18 n.9. UP advised both courts that the slow order theory was preempted, and that *State Farm* did not permit Arkansas to punish conduct over which it lacked jurisdiction.

of negligence for failure to issue a slow order.[8]

5. In the alternative, if this Court reviews or summarily reverses the decision of the Utah Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, (*State Farm II*),[9] petitioner respectfully suggests that this case be held for a grant, vacate, and remand order. Because the decision in this case relied heavily on *State Farm I*, any further developments in that case will inexorably "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). In particular, the Utah Supreme Court defied this Court's determination that a 1-to-1 ratio was appropriate in light of the substantial compensatory damages. Petitioners in *State Farm II* have asked this Court to make clear that *State Farm I* meant what it said, and any such clarification will necessarily implicate this case. Moreover, petitioners in *State Farm II* present issues concerning the use of punitive damages to punish a defendant "for its litigation conduct," *State Farm* Pet. at 20-24, as well as proper interpretation of the third guidepost, *id.* at 28-30. Any additional guidance this Court provides regarding *State Farm* will necessarily have a direct bearing on the decision in this case, and thus would warrant a GVR.

CONCLUSION

This Court should grant plenary review or summarily reverse. In the alternative, it should hold this case to be vacated and remanded in light of any decision in *State Farm II*.

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[8] Respondents' arguments notwithstanding, Opp. at 21 n.11, *Easterwood* unambiguously preempted the slow order theory. *See* Brief of Association of American Railroads at 16 n.10.

[9] State Farm sought certiorari on July 20, 2004. *See* Petition for a Writ of Certiorari, *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 04-116. ("*State Farm* Pet."). *State Farm II* is on the September 27, 2004 conference list.

Respectfully submitted,

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